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# CONSIDERING THE CONSTITUTIONALITY OF NONSTATE INTERVENORS IN ORIGINAL JURISDICTION ACTIONS

*John C. Sullivan\**

One of these things is not like the others,  
One of these things just doesn't belong,  
Can you tell which thing is not like the others  
By the time I finish my song?<sup>1</sup>

## INTRODUCTION

It is not often that one begins to hum a familiar Sesame Street tune when reading Supreme Court opinions—but with Chief Justice John Roberts, you never know what you might get. His dissent in *Alabama v. North Carolina*<sup>2</sup> begins with a not-so-subtle jab, based on the children's game “One of these things is not like the others,” that the question of allowing nonstate party intervenors in an original jurisdiction case in the Supreme Court should not have been a hard one.<sup>3</sup> But could the answer really be that simple?

To address the question of intervenors, original jurisdiction itself must first be considered. Article III's language is familiar: “In all Cases affecting Ambassadors, other public Ministers and Consuls, and

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\* Candidate for Juris Doctor, 2012, Notre Dame Law School. This Note is dedicated to my family: words cannot convey how blessed I am. I would like to thank Professors Anthony J. Bellia, William K. Kelley, and Jay Tidmarsh for their instruction and guidance on this project—I am a better student and person for knowing them. Finally, thank you to the *Notre Dame Law Review* for excellent editing assistance; any errors that remain must be mine.

1 METRO LYRICS, <http://www.metrolyrics.com/one-of-these-things-is-not-like-the-others-lyrics-sesame-street.html> (last visited Aug. 13, 2011).

2 130 S. Ct. 2295 (2010).

3 See *id.* at 2317 (Roberts, C.J., concurring in part and dissenting in part) (“The parties to this case are Alabama, Florida, North Carolina, Tennessee, Virginia, and the Southeast Interstate Low-Level Radioactive Waste Management Commission. One of these things is not like the others . . . . Our Constitution does not countenance such ‘no harm, no foul’ jurisdiction . . .”).

those in which a State shall be a Party, the supreme Court shall have original Jurisdiction.”<sup>4</sup> However, as both a practical and statutory matter, “the Supreme Court [obviously] does not have original jurisdiction over *every* case in which a state is a party.”<sup>5</sup> Rather than remaining completely open-ended concerning cases involving states, this jurisdiction has been limited by Congress<sup>6</sup> to (1) controversies between states, (2) controversies between the United States and a state (in response to the decision in *United States v. Texas*<sup>7</sup>), and (3) cases where a state sues the citizens of another state.<sup>8</sup> This also comports with the Court’s understanding of its role.<sup>9</sup> Noticeably absent

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4 U.S. CONST. art. III, § 2.

5 EUGENE GRESSMAN ET AL., *SUPREME COURT PRACTICE* 610 (BNA Books 9th ed. 2007) (emphasis added).

6 This enterprise is not beyond doubt. Given the express textual provisions of Article III, it can be argued that the original jurisdiction of the Supreme Court does not need a statutory grant to be in force. See, e.g., *Kline v. Burke Constr. Co.*, 260 U.S. 226, 234 (1922) (“Only the jurisdiction of the Supreme Court is derived directly from the Constitution. Every other court created by the general government derives its jurisdiction wholly from the authority of Congress.”); cf. Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205, 232 (1985) (“Read together, the first three Articles of the Constitution establish three equal and co-ordinate branches of federal government, each of which derives its power not from the other branches, but from the Constitution itself.”).

7 143 U.S. 621 (1892) (holding that the Supreme Court’s original jurisdiction included cases between the United States and a state).

8 See 28 U.S.C. § 1251 (2006):

(a) The Supreme Court shall have original and exclusive jurisdiction of all controversies between two or more States.

(b) The Supreme Court shall have original but not exclusive jurisdiction of:

(1) All actions or proceedings to which ambassadors, other public ministers, consuls, or vice consuls of foreign states are parties;  
 (2) All controversies between the United States and a State;  
 (3) All actions or proceedings by a State against the citizens of another State or against aliens.

9 See, e.g., *South Carolina v. North Carolina*, 130 S. Ct. 854, 861 (2010) (“Article III, § 2, of the Constitution expressly contemplates suits ‘between a State and Citizens of another State’ as falling within our original jurisdiction . . .” (referencing *Georgia v. Brailsford*, 2 U.S. (2 Dall.) 402 (1792))); see also GRESSMAN ET AL., *supra* note 5, at 617 (“[T]he Supreme Court since 1939 has declined to exercise jurisdiction in some original cases where lower federal courts had concurrent jurisdiction. Although the statutory provision calling for original and exclusive Supreme Court jurisdiction of all controversies between states, 28 U.S.C. §1251 (a), would seem to mean that the Court is obligated to hear and decide all such cases, the Court has since 1976 declined to exercise original jurisdiction even in some controversies between the states. *Arizona v. New Mexico*, 425 U.S. 794 (1976). Due to its perception of its role and the magnitude of its workload, the Court has exercised discretion in accepting original cases whether its jurisdiction is exclusive or concurrent.” (citation omitted)).

from this grouping of scenarios is the possibility of a citizen suing a state. Though Article III could encompass such jurisdiction, the Supreme Court has controversially determined that, once *Chisholm* was allowed to sue Georgia,<sup>10</sup> the ratification of the Eleventh Amendment<sup>11</sup> ensured that a citizen could not sue a state in federal court under any circumstances—let alone in an original action of the Supreme Court.<sup>12</sup>

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10 *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793).

11 U.S. CONST. amend. XI (“The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.”).

12 The interpretation of the Amendment was expanded (or brought into conformity with the background assumptions of the Constitution, depending on how one views it) to include a proscription on citizens suing their own state on a federal question in *Hans v. Louisiana*, 134 U.S. 1 (1890), and confirmed, over a vigorous dissent by Justice Souter, in *Seminole Tribe v. Florida*, 517 U.S. 44 (1996). It has been argued that *Hans* was in line with the background assumption, present at the time of the founding and the ratification of the Eleventh Amendment, that the Constitution did not authorize citizens to sue their own states. See Bradford R. Clark, *The Eleventh Amendment and the Nature of the Union*, 123 HARV. L. REV. 1817, 1895 (2010) (“Thus, whether a suit arises under state law, general law, or federal law, the Amendment—by its terms—prohibits federal courts from hearing any suit brought by a prohibited plaintiff against a state.”); Alfred Hill, *In Defense of Our Law of Sovereign Immunity*, 42 B.C. L. REV. 485, 489 (2001) (“[W]hen adopted, the Constitution was understood as embodying an understanding that the federal and state governments were free to invoke the doctrine of sovereign immunity for themselves, even if this meant that rights given by the federal Constitution would go unenforced.”).

This point, though, is not without dispute. See *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 260 (1985) (Brennan, J., dissenting) (“The early history of the Constitution reveals, however, that the Court in *Hans* was mistaken. The unamended Article III was often read to the contrary to prohibit . . . the assertion of state sovereign immunity as a defense, even in cases arising solely under state law.”); William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction*, 35 STAN. L. REV. 1033, 1033–34 (1983) (“The Court apparently views the amendment as a form of jurisdictional bar that specifically limits the power of federal courts to hear private citizens’ suits against unconsenting states. . . . [T]his view of the amendment is mistaken. . . . [T]he amendment merely required a narrow construction of constitutional language affirmatively authorizing federal court jurisdiction and . . . did nothing to prohibit federal court jurisdiction.”); John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889, 1893 (1983) (“[A] peculiar and temporary set of political circumstances led the Supreme Court, in one of the boldest examples of judicial activism in its history, to rewrite the amendment, giving it a meaning [in *Hans*] that its framers never intended it to have.”).

As it stands, the Supreme Court hears original jurisdiction actions on an almost purely discretionary basis.<sup>13</sup> Chief Justice Rehnquist highlighted, in *Mississippi v. Louisiana*,<sup>14</sup> the progression of the Court's model.<sup>15</sup> Originally, the Court used "discretion not to accept original actions in cases within [its] nonexclusive original jurisdiction, such as actions by States against citizens of other States and actions between the United States and a State. [The Court has] since carried over its exercise to actions between two States, where [its] jurisdiction is exclusive."<sup>16</sup> Though state vs. state jurisdiction is statutorily committed to the exclusive original jurisdiction of the Supreme Court, the litigants must still pass a two part test in order to be granted leave to file on the Court's original docket.<sup>17</sup> However, "[w]hatever the Court's intention to limit the scope and exercise of its original jurisdiction, under a theory of strict construction it cannot refuse to enter-

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13 See Vincent L. McKusick, *Discretionary Gatekeeping: The Supreme Court's Management of Its Original Jurisdiction Docket Since 1961*, 45 ME. L. REV. 185, 202 (1993) ("The substantial set of gatekeeping rules that the Supreme Court has developed adds up to making its original jurisdiction for practical purposes almost as discretionary as its certiorari jurisdiction over appellate cases, even for suits between states that . . . fall within the congressional definition of exclusive Supreme Court jurisdiction.").

14 506 U.S. 73 (1992).

15 This represents a change from the Court's early understanding that its original jurisdiction was exclusive. See, e.g., *Osborn v. Bank of the U.S.*, 22 U.S. (9 Wheat.) 738, 821 (1824) ("The constitution establishes the Supreme Court, and defines its jurisdiction. It enumerates cases in which its jurisdiction is original and exclusive . . .").

16 *Mississippi*, 506 U.S. at 77 (citations omitted).

17 See *id.* "Determining whether a case is 'appropriate' for [the Supreme Court's] original jurisdiction involves an examination of two factors. First, [the Court will] look to 'the nature of the interest of the complaining State,'" *id.* (quoting *Massachusetts v. Missouri*, 308 U.S. 1, 18 (1939)), "focusing on the 'seriousness and dignity of the claim.'" *Id.* (quoting *Illinois v. City of Milwaukee*, 406 U.S. 91, 93 (1972)). "'The model case for invocation of th[e] Court's original jurisdiction is a dispute between States of such seriousness that it would amount to *casus belli* if the States were fully sovereign.'" *Id.* (quoting *Texas v. New Mexico*, 462 U.S. 554, 571, n.18 (1983)). "Second, [the Court will] explore the availability of an alternative forum in which the issue tendered can be resolved." *Id.* (quoting *City of Milwaukee*, 406 U.S. at 93). "In *Arizona v. New Mexico*, for example, [the Court] declined to exercise original jurisdiction of an action by Arizona against New Mexico challenging a New Mexico electricity tax because of a pending state-court action by three Arizona utilities challenging the same tax: '[W]e are persuaded that the pending state-court action provides an appropriate forum in which the issues tendered here may be litigated.'" *Id.* (quoting *Arizona v. New Mexico*, 425 U.S. 794, 797 (1976)).

tain cases falling within its original jurisdiction if no other forum is available.”<sup>18</sup>

One thing left open to the Supreme Court was the question of intervention by nonstate parties in these original jurisdiction cases. Intervention is “the procedural device whereby a stranger can present a claim or defense in a pending action or in a proceeding incidental thereto, and become a party for the purpose of the claim or defense presented.”<sup>19</sup> While it is apparent that the founders did not envision citizens being able to haul states into federal court,<sup>20</sup> they were silent as to those citizens presenting claims or defenses in matters that were already before the Court. Given the common-law pleading regime persistent at the time of the founding and code-pleading afterward, this is not surprising.<sup>21</sup> It is only with the rise of the transactional model and its more liberal ideas of intervention and case management that these types of questions arise.<sup>22</sup> Once facts became the unit of dispute, rather than legal entitlements, intervention became a staple of the modern suit<sup>23</sup> and the Court has struggled since with how to employ it.<sup>24</sup>

The first instance of a nonstate party intervening as a plaintiff seems to have taken place in 1922, in *Oklahoma v. Texas*.<sup>25</sup> The occasion for it happening in that case seems to be unique<sup>26</sup> and, since that

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18 Anne-Marie C. Carstens, *Lurking in the Shadows of Judicial Process: Special Masters in the Supreme Court's Original Jurisdiction Cases*, 86 MINN. L. REV. 625, 640 (2002).

19 James Wm. Moore & Edward H. Levi, *Federal Intervention I. The Right to Intervene and Reorganization*, 45 YALE L.J. 565, 565 (1936).

20 See Clark, *supra* note 12, at 1913 (“The Court considered the supposition that the framers and ratifiers of the Amendment had left citizens free to sue their own states to be ‘almost an absurdity on its face.’” (quoting *Hans v. Louisiana*, 134 U.S. 1, 15 (1890))).

21 See Moore & Levi, *supra* note 19, at 566 (“The modern theory on joinder of parties has little in common with the restrictive and rigid common-law rules designed for simple litigation in an era when formalism was the vogue.”).

22 See generally Anthony J. Bellia Jr., *Article III and the Cause of Action*, 89 IOWA L. REV. 777 (2004) (highlighting differences between historical actions at law and transactional or rights-based understandings).

23 See Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1290 (1976) (“The proponents of ‘efficiency’ argued for a more informal and flexible approach, to the end that the courts should not have to rehear the same complex of events. This argument ultimately shifted the focus of the lawsuit from legal theory to factual context—the ‘transaction or occurrence’ from which the action arose. This in turn made it easier to view the set of events in dispute as giving rise to a range of legal consequences all of which ought to be considered together.” (footnote omitted)).

24 See *id.*

25 258 U.S. 574 (1922).

26 See *infra* Part I.

time, similar interventions against states have occurred infrequently and not without questions as to their propriety.<sup>27</sup> The question recently resurfaced in two cases on the Supreme Court's original jurisdiction docket during the October 2009 Term.<sup>28</sup> In both instances, the Court held, over vigorous dissents by the Chief Justice, that nonstate parties would be allowed to intervene in a suit against a state.<sup>29</sup> The question, therefore, arises: were these decisions correct, and what should the Court's position be moving forward?

Part I of this Note will discuss the relevant history of nonstate party involvement in original actions in the Supreme Court. While Justice Alito traces the phenomenon itself back to the 1700s,<sup>30</sup> the more difficult question of intervention as plaintiffs, and the form under which the Court currently deals with the issue, is relatively new.<sup>31</sup> An overview of these previous cases will help to shed light on the current state of the Court's jurisprudence in this area. Part II will examine the most recent cases in order to discern, if possible, a consistent position regarding that jurisprudence. The *Alabama* and *South Carolina* opinions, while both allowing nonstate intervention, contain potentially conflicting criteria for the action. While *South Carolina* allows for nonstate intervention when a party has a "unique . . . interest,"<sup>32</sup> *Alabama* held that sovereign immunity did not bar such intervention as long as the "same claims"<sup>33</sup> are asserted. This difference should be recognized and addressed before the Court continues to entertain such motions from nonstate parties. Part III will take a particular look at Chief Justice Robert's argument against such intervention in *Alabama*. While his *South Carolina* argument based merely on sovereignty concerns garnered four votes,<sup>34</sup> the seemingly stronger argument, with which only Justice Thomas agreed, is the one articu-

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27 See, e.g., *Arizona v. California*, 460 U.S. 605 (1983) (allowing certain Indian tribes, arguably because of the United States' role in the suit and because tribes are quasi-sovereign entities, to intervene as plaintiffs against California); *Maryland v. Louisiana*, 451 U.S. 725 (1981) (allowing private companies, arguably without due diligence to the Eleventh Amendment, to intervene as plaintiffs).

28 *South Carolina v. North Carolina*, 130 S. Ct. 854 (2010); *Alabama v. North Carolina*, 130 S. Ct. 2295 (2010).

29 *South Carolina*, 130 S. Ct. at 859; *Alabama*, 130 S. Ct. at 2314–15.

30 See *South Carolina*, 130 S. Ct. at 861.

31 See *id.* at 862 ("This court likewise has granted leave, under appropriate circumstances, for nonstate entities to intervene as parties in original actions between States for nearly 90 years.").

32 *Id.* at 866 (emphasis added).

33 *Alabama*, 130 S. Ct. at 2314 (emphasis added).

34 *South Carolina*, 130 S. Ct. at 869–70 (Roberts, C.J., dissenting).

lated in *Alabama* based on the Eleventh Amendment.<sup>35</sup> Because *South Carolina* involved defendant intervenors, the state immunity argument did not surface in the Chief Justice's dissent there. The analysis in *Alabama* is different. Due to both Eleventh Amendment and Federalism concerns, Part IV ultimately concludes that, while nonstate defendant intervenors in original jurisdiction actions are within the scope of Article III, the Court stepped outside of constitutional bounds by allowing nonstate parties to intervene as plaintiffs. Since this directly resulted from attempting to reconcile the sensible standard of intervention outlined in *South Carolina* with the inexplicably expanded standard in *Alabama*,<sup>36</sup> a return to the *South Carolina* standard can both bring consistency to original action jurisprudence as well as avoid the Eleventh Amendment pitfall present in *Alabama*.

I. FROM PLAINTIFFS TO ONLY DEFENDANTS TO PLAINTIFFS AGAIN—  
THE HISTORY OF NONSTATE INVOLVEMENT IN SUPREME  
COURT ORIGINAL JURISDICTION CASES

The Constitution clearly allows for two types of suits in which states are quite frequently involved: those between two or more states and those between states and citizens.<sup>37</sup> And when the parts of Article III, section two are taken together, it is also clear that these types of suits fall within the original jurisdiction of the Supreme Court.<sup>38</sup> Beyond that, the Court has traditionally made room on its original

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35 See *Alabama*, 130 S. Ct. at 2317–19 (Roberts, C.J., concurring in part and dissenting in part).

36 See *infra* Part II.C.

37 U.S. CONST. art. III, § 2 (“The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; to all Cases affecting Ambassadors, other public Ministers and Consuls; to all Cases of admiralty and maritime Jurisdiction; to Controversies to which the United States shall be a Party; to Controversies between two or more States; between a State and Citizens of another State; between Citizens of different States; between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.”) (emphasis added).

38 This interpretation of the second sentence of section two makes the most textual sense and has been so read by the Supreme Court. “The second sentence of Article III, §2 merely distributes the jurisdiction conferred in the first sentence between the Supreme Court’s original jurisdiction and its appellate jurisdiction; it does not itself confer jurisdiction.” GRESSMAN ET AL., *supra* note 5, at 610; see also *Pennsylvania v. Quicksilver Mining Co.*, 77 U.S. 553, 556 (1871) (“This second clause distributes the jurisdiction conferred upon the Supreme Court in the previous one into original and appellate jurisdiction; but does not profess to confer any.”).



docket for cases that combine these components<sup>39</sup> and cases that are only *partially* formed by the presence of these components.<sup>40</sup>

A. *Original Jurisdiction Cases Prior to 1922—The Beginnings of Nonstate Party Involvement*

It did not take long for a nonstate party to appear before the Supreme Court in an original jurisdiction action. One of the first occurrences was in 1792 “[i]n *Georgia v. Brailsford*,<sup>41</sup> the fourth case entered upon ‘the original docket’ of the Supreme Court.”<sup>42</sup> While the Justices were divided as to the outcome, none of them had a jurisdictional problem with the state of Georgia suing two citizens of South Carolina.<sup>43</sup> This was not uncommon, and while these types of cases are not exclusive to the original jurisdiction of the Court, it was and still is appropriate for the Court to hear them.<sup>44</sup> Somewhat ironically, *Chisholm v. Georgia*,<sup>45</sup> the case immediately in front of *Brailsford* on the original docket,<sup>46</sup> turned the tables by allowing a citizen of South Carolina to sue Georgia.<sup>47</sup> The uproar over the outcome famously sparked an Amendment to the Constitution.<sup>48</sup> But prior to the passage of the Eleventh Amendment, this type of interaction by a nonstate party was clearly acceptable. Therefore, while an argument exists that nonstate parties should not be allowed to *sue* in original actions of the Supreme Court,<sup>49</sup> it is undisputed that the Constitution allows for them to *be sued* in such cases; that was never in doubt.

Once nonstate parties were involved in suits with states, they began to also take part in suits between states. Just a few years after

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39 See *infra* Part I.A.

40 See *infra* Part I.B–D.

41 2 U.S. (2 Dall.) 402 (1792).

42 HANNIS TAYLOR, JURISDICTION AND PROCEDURE OF THE SUPREME COURT OF THE UNITED STATES 51 (1905).

43 See *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 473 (1793) (opinion of Jay, C.J.).

44 See U.S. CONST. art. III; 28 U.S.C. § 1251 (2006).

45 2 U.S. (2 Dall.) 419 (1793) *superseded by constitutional amendment*, U.S. CONST. amend. XI.

46 See TAYLOR, *supra* note 42, at 70.

47 See *Chisholm*, 2 U.S. (2 Dall.) at 479 (opinion of Jay, C.J.) (“[A] State is suable by citizens of another State.”).

48 See Clark, *supra* note 12, at 1886–87 (“The reaction to *Chisholm* was swift and almost uniformly hostile. The anger seemed to be directed as much against Federalists . . . as against the Supreme Court itself. . . . [H]owever, . . . Federalists were equally disappointed with the Court’s decision . . . [and] joined Antifederalists in supporting a constitutional amendment to restore their preferred construction.”).

49 See *infra* Part III.

*Chisholm*, the Court heard *New York v. Connecticut*<sup>50</sup>—the first original jurisdiction case between two states.<sup>51</sup> This case serves as a precursor to the modern state of jurisprudence in this area by virtue of the non-state parties also involved. The full name of the case was “The State of New York v. The State of Connecticut *et al.*,” and it involved plaintiffs from a prior civil suit concerning land being made defendants in the action between states over a border dispute.<sup>52</sup> Though the ‘*et al.*’ in the case were not intervenors, they still represented nonstate party involvement in an original jurisdiction action. Similarly, in *Missouri v. Illinois*,<sup>53</sup> also known as the “State of Missouri v. State of Illinois *and Sanitary District of Chicago*,” there was, again, involuntary nonstate party involvement in an original jurisdiction action—the Sanitary District was made a defendant by Missouri.<sup>54</sup> These cases are indicative of original jurisdiction jurisprudence through the first part of the twentieth century. Reading the two parts of Article III, section two together, both of these cases show an expansion of thought from a strict formulation of Article III.<sup>55</sup> This combination of state and nonstate parties in suits posed no constitutional problem, though, as it was merely a synthesis of two jurisdictionable<sup>56</sup> classes: suits by states against other states and suits by states against other states’ citizens.

*B. Oklahoma v. Texas*<sup>57</sup>—A Shift in Nonstate Party Jurisdiction

Prior to 1922, nonstate involvement in original jurisdiction cases was limited (at least after *Chisholm*) to instances where those parties were the ones being sued; that changed in *Oklahoma v. Texas*. After an initial suit was commenced between the two states, the United States intervened, using its authority under *United States v. Texas*,<sup>58</sup> to bring suit against both states in order to resolve a boundary dispute.<sup>59</sup> This

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50 4 U.S. (4 Dall.) 1 (1799).

51 See *Missouri v. Illinois*, 180 U.S. 208, 224 (1901) (“The case of *New York v. Connecticut*, in 1799, was the first instance of an exercise by the Supreme Court of its jurisdiction in a controversy between two states.” (citation omitted)).

52 See *New York*, 4 U.S. (4 Dall.) at 1. This case arose after the Supreme Court denied the requests of the nonstate parties to represent their states (New York and Connecticut) in an original jurisdiction action. See *Fowler v. Lindsey*, 3 U.S. (3 Dall.) 411, 413–15 (1799).

53 180 U.S. 208 (1901).

54 See *id.* at 208–09.

55 See *supra* note 38.

56 Either a case or a category of parties over which a court can exercise jurisdiction.

57 258 U.S. 574 (1922).

58 See *supra* note 7.

59 See *Oklahoma*, 258 U.S. at 578–79.

new, enlarged suit was not a problem as it could simply be viewed as another amalgamation of jurisdictionable classes into one case. However, in the meantime, the United States had taken possession of the land being contested.<sup>60</sup> Nonstate party intervenors were then allowed to join the action because of the unique nature of the receivership relationship<sup>61</sup> and, in a form of “ancillary” jurisdiction to the initial suit, permitted to prosecute claims.<sup>62</sup>

The case thus presented, for the first time, nonstate intervenors in an original jurisdiction suit as plaintiffs in a state-versus-state scenario.<sup>63</sup> Why was this not a violation of the Eleventh Amendment?<sup>64</sup> The Court noted that, because the United States placed the disputed land into a receiver’s possession, a unique situation was created that allowed ancillary jurisdiction where “independent suits to enforce the claims could not [normally] be entertained.”<sup>65</sup> It should also be noted that the intervenors’ claims, whether ancillary or not, were effectively made against the United States<sup>66</sup>—which had presumably waived immunity due to taking on the receivership—rather than the states themselves. Though the land belonged to the states, it also belonged to the United States, and it was the federal sovereign who took possession of the land and opened the door to the nonstate intervenors.<sup>67</sup> Thus, the situation may not have been a *carte blanche*

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60 See *id.* at 580.

61 See *id.* at 581 (“[N]umerous parties . . . intervened for the purpose of asserting rights to particular tracts [of land] in the [United States’] possession . . .” (emphasis added)).

62 See *id.* (“The other claims . . . are brought before us because no other court lawfully can interfere with or disturb [the receiver’s] possession or control. It long has been settled that claims to property or funds of which a court has taken possession and control through a receiver or like officer may be dealt with as ancillary to the suit . . .”).

63 See *South Carolina v. North Carolina*, 130 S. Ct. 854, 862 (2010) (referencing the intervention in *Oklahoma*).

64 See Chayes, *supra* note 23, at 1290 (“The question of the right to intervene is inevitably linked to the question of standing to initiate litigation in the first place.”). If the nonstate party has no standing to initiate in the first place due to the Eleventh Amendment, intervention should also be barred because of the concomitant extension of the judicial power of the United States to a suit prosecuted by a citizen against a state.

65 *Oklahoma*, 258 U.S. at 581. It seems to still be a type of supplemental jurisdiction that the Court invokes to bring nonstate parties into original jurisdiction action. See *infra* Part III.

66 See *Oklahoma*, 258 U.S. at 581 (stating that the land in question was “in the [United States’] possession”).

67 The presence of property in the hands of the court (or, in this case, the sovereign represented by the Supreme Court) traditionally played a determinative role in

for intervenors to prosecute suits against states. The Court would later seize upon this decision, however, to enlarge nonstate parties' rights to do exactly that.<sup>68</sup>

C. Maryland v. Louisiana<sup>69</sup>—*The Transformation of Nonstate Parties to Full Plaintiff Status*

Building off of the potential misunderstanding from *Oklahoma*, the Supreme Court allowed several private parties to intervene in an original action against a state in *Maryland v. Louisiana*. This time, although the United States was again an intervenor, there was no unusual insertion by the federal government (i.e., acting as receiver in *Oklahoma v. Texas*). Nevertheless, "noting that it is not unusual to permit intervention of private parties in original actions,"<sup>70</sup> the Court allowed "several States, joined by the United States and a number of pipeline companies, [to] challenge the constitutionality of Louisiana's 'First-Use Tax' imposed on certain uses of natural gas."<sup>71</sup>

The distinguishing characteristic of the decision was its focus on the propriety of the states' involvement in the original action while literally ignoring the presence of a nonstate entity suing in seeming violation of the Eleventh Amendment.<sup>72</sup> The Amendment is only mentioned, admittedly "in passing," in one footnote that fails to even address the real question.<sup>73</sup> The Court argued that its "original jurisdiction [was] not affected by the provisions of the Eleventh Amendment" because "an original action *between two States* only violates the Eleventh Amendment if the plaintiff State is actually suing to recover

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whether a court would allow intervention, and the overtones of that can be seen here. See Moore & Levi, *supra* note 19, at 572–73.

68 Almost the exact scenario arose in 1976 when the City of Port Arthur, Texas was allowed to intervene in a suit where Louisiana was the defendant. See *Texas v. Louisiana*, 426 U.S. 465 (1976). The case was similar in that the United States had first intervened, and then the city "was permitted to [also] intervene for purposes of protecting its interests in the . . . claims of the United States." *Id.* at 466 (emphasis added).

69 451 U.S. 725 (1981).

70 *Id.* at 745 n.21 (referencing *Oklahoma v. Texas* approvingly).

71 *Id.* at 728.

72 See *id.* at 735 (arguing for general original jurisdiction in cases between states); see also *id.* at 737 ("Jurisdiction is also supported by the States' interest as *parens patriae*."); *id.* at 739–44 (arguing further for the suitability, with respect to providing original jurisdiction over the state claim, of allowing the suit because of the inappropriateness of any other forum). The fighting in *Maryland* was about whether the state claim could be heard in an original action because of the actual interests being represented. The arguments never addressed the correctness of admitting the intervenors.

73 *Id.* at 745 n.21.

for injuries to specific individuals.”<sup>74</sup> The Court, by focusing only on the effect the Eleventh Amendment would have on the *state’s* suit, completely ignored the potential Eleventh Amendment violation coming from the *nonstate’s* suit—the very thing the Amendment addressed in the first place.

*D. Arizona v. California*<sup>75</sup>—*Solidifying the Transformation of Nonstate Parties to Full Plaintiff Status*

As a cornerstone of the recent cases in this area,<sup>76</sup> it is crucial to highlight the Court’s reasoning regarding nonstate intervenors to original jurisdiction cases in *Arizona v. California*. There, Arizona filed suit against California over water rights, Nevada intervened, and Utah and New Mexico were subsequently joined as defendants.<sup>77</sup> The United States then intervened (reminiscent of *Oklahoma v. Texas*) “on behalf of various federal establishments, including the reservations of five Indian Tribes.”<sup>78</sup> “Because the United States . . . represented their interests, the Indian Tribes [initially] . . . had no part in the litigation,” but later “moved for leave to intervene as indispensable parties.”<sup>79</sup> The Court agreed that their motions should be granted.<sup>80</sup>

The Court began by assuming *arguendo* that a state could use the Eleventh Amendment to bar a suit brought by an Indian tribe.<sup>81</sup> The next move was to tie the intervenors’ claims to those of the United States.<sup>82</sup> In keeping with the *Oklahoma/Maryland* line of thought, the Court then simply *assumed* that the “piggybacking” of claims onto the

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<sup>74</sup> *Id.* (emphasis added).

<sup>75</sup> 460 U.S. 605 (1983).

<sup>76</sup> Justice Scalia highlights *Arizona* as the case that would need to be overturned in order to accept the Chief Justice’s argument in *Alabama*. See *infra* notes 183–89 and accompanying text.

<sup>77</sup> See *Arizona*, 460 U.S. at 608.

<sup>78</sup> *Id.* at 608–09.

<sup>79</sup> *Id.* at 612.

<sup>80</sup> See *id.* at 613.

<sup>81</sup> See *id.* at 614. This contention, however, is far from certain—especially considering the quasi-sovereign nature of Indian Tribes that somewhat parallels state sovereignty. The decision to allow intervention may thus have been right for the wrong reason. This question will be dealt with further in Part III with a look at the implications of *Seminole Tribe v. Florida*, 517 U.S. 44 (1995).

<sup>82</sup> See *Arizona*, 460 U.S. at 614 (“Nothing in the Eleventh Amendment ‘has ever been seriously supposed to prevent a State’s being sued by the United States.’ The Tribes do not seek to bring new claims or issues against the States, but only ask leave to participate in an adjudication . . . commenced by the United States.” (citations omitted) (quoting *United States v. Mississippi*, 380 U.S. 128, 140 (1965))).

existing suit did not violate the Eleventh Amendment.<sup>83</sup> By utilizing *Oklahoma* (where the immunity question was unnecessary)<sup>84</sup> and *Maryland* (where the immunity question was overlooked),<sup>85</sup> the Court was able to again allow intervention without actually answering the Eleventh Amendment question. Instead, the Court's efforts go toward establishing that the Indian Tribes count just like everyone else<sup>86</sup> when it comes to piling-on to existing suits.<sup>87</sup> Though the justification was obviously not beyond reproach, it paved the way for the recent decisions to which we now turn.

## II. JUSTIFYING INTERVENTION AND RECONCILING JURISPRUDENCE—THE CURRENT MODEL FOR NONSTATE INVOLVEMENT IN SUPREME COURT ORIGINAL JURISDICTION CASES

It is in view of this patchwork of assumptions and judicial hand-waving that the Supreme Court recently considered again the question of allowing nonstate intervenors in original jurisdiction actions. In a 5–4 decision in *South Carolina v. North Carolina*,<sup>88</sup> the Court upheld the decision of the Special Master in the case and granted motions for nonstate parties to intervene as defendants.<sup>89</sup> The reasoning behind granting the motions, however, could be seen to conflict with the reasoning allowing nonstate intervention in *Alabama v.*

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83 See *id.* (“[O]ur judicial power over the controversy is not enlarged by granting leave to intervene, and the States’ sovereign immunity protected by the Eleventh Amendment is not compromised.”).

84 See *supra* notes 64–67 and accompanying text.

85 See *supra* notes 72–74 and accompanying text.

86 See *Arizona*, 460 U.S. at 615 (“Moreover, the Indians are entitled ‘to take their place as independent qualified members of the modern body politic.’” (quoting *Poafpybitty v. Skelly Oil Co.*, 390 U.S. 365, 369 (1968))). By focusing exclusively on ensuring that Tribes “count,” it seems the Court failed to consider that they should count differently. The argument assumed at the beginning to be a given—that states are immune from suit against Indian Tribes—began to break down as Indian sovereignty started to subtly work its way into the reasoning behind allowing intervention. See *infra* notes 188 and 194 and accompanying text (arguing that recognizing the sovereignty of Indian Tribes is the correct thing to do and that the *Arizona* decision should, thus, not pose an Eleventh Amendment problem).

87 A definite bias in allowing intervention exists owing to an underlying sense of fairness that people/groups should be allowed to participate when their rights are at stake—even if those rights are already being represented by another party. See Moore & Levi, *supra* note 19, at 573 (“Modern intervention practice, as will be seen, is an expansion of what seems to have always been the underlying principle in the development of intervention: the purpose of the courts to prevent their processes from being used to the prejudice of the rights of interested third persons.”).

88 130 S. Ct. 854 (2010).

89 *Id.* at 868.

*North Carolina*.<sup>90</sup> The two opinions, six months apart, seem to provide mutually exclusive justifications for when the Court will allow nonstate intervenors in original jurisdiction actions. This portion of the Note will examine the two opinions, with respect to intervention standards, and attempt to develop a sound and consistent view of nonstate intervention moving forward.

A. *Thesis*—South Carolina v. North Carolina, *Allowing Nonstate Intervention as Defendants*

As is true with many suits between states, *South Carolina v. North Carolina* was about water rights.<sup>91</sup> South Carolina complained that North Carolina was exceeding its equitable use of the Catawba River.<sup>92</sup> Two private entities named in the original complaint were granted leave to intervene—the Catawba River Water Supply Project (CRWSP), a bi-state entity jointly owned by North Carolina's Union County and South Carolina's Lancaster County, and Duke Energy, a license holder entitled to use the river to generate power.<sup>93</sup> Given the history of nonstate involvement discussed previously, the Court held that it was "not a novel proposition to accord party status to a citizen in an original action between States."<sup>94</sup> However, since "a compelling reason for allowing citizens to participate in one original action is not necessarily a compelling reason for allowing citizens to intervene in all original actions," the Court attempted to establish a workable set of criteria for when such intervention is appropriate.<sup>95</sup>

The Court relied on *New Jersey v. New York*<sup>96</sup> in laying down the appropriate standard for intervention of nonstate parties.<sup>97</sup> When an entity, whose state is already a party, moves to intervene in an original jurisdiction action, the intervenor has "the burden of showing some compelling interest in his own right, apart from his interest in a class

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90 See Part II.B *infra*. The *Alabama* decision is fundamentally different because of the plaintiff status of the party there but, nevertheless, contributes to the language of the intervention standard being developed by the Court.

91 Boundary disputes are the most common, by far. See TAYLOR, *supra* note 42, at 57.

92 See *South Carolina*, 130 S. Ct. at 859.

93 See *id.* at 860.

94 *Id.* at 862.

95 *Id.*

96 345 U.S. 369 (1953).

97 See *South Carolina*, 130 S. Ct. at 862. The *New Jersey* Court held that the City of Philadelphia could not intervene because of Pennsylvania's *parens patriae* role in the suit providing adequate representation in a matter of sovereign interest. See *New Jersey*, 345 U.S. at 372–73.

with all other citizens and creatures of the state, which interest is not properly represented by the state.”<sup>98</sup> Even though the majority in *South Carolina* acknowledged the “high threshold to intervention by nonstate parties in a sovereign dispute committed to [the] Court’s original jurisdiction,”<sup>99</sup> it utilized the *New Jersey* standard to “conclude that the CRWSP . . . demonstrated a sufficiently compelling interest that [was] unlike the interests of other citizens of the States.”<sup>100</sup> Duke Energy was also held to have a “unique and compelling interest” to intervene in the suit<sup>101</sup> while the City of Charlotte was denied even permissive intervention, which can be granted “when a movant presents a sufficiently ‘important but ancillary concern.’”<sup>102</sup>

The dissent in *South Carolina* relied on two prudential concerns for justifying a withholding of jurisdiction: (1) the suit was an equitable apportionment action and, as such, merited withholding of the original jurisdiction suited for “weighty controversies involving the States,”<sup>103</sup> and (2) the Supreme Court is “not well suited to assume the role of a trial judge.”<sup>104</sup> However, the dissent’s arguments against intervention can be answered by the Court’s previous involvement in equitable apportionment suits with nonstate intervenors<sup>105</sup> and its long history of using Special Masters to ease the burden of trial-type duties.<sup>106</sup> Because the intervenors are on the side of the defense, the possible problem here would be a diversity issue due to the fact that the CRWSP was a citizen of both states.

“In interpreting its original jurisdiction, the Supreme Court has adopted something akin to the ‘complete diversity rule’ governing the scope of diversity jurisdiction between private parties under 28 U.S.C. § 1332, rejecting notions of supplemental jurisdiction.”<sup>107</sup> The import of this is that, because South Carolina would be suing citizens of its state, the complete diversity would break down<sup>108</sup> and either the CRWSP would not be allowed to intervene or, if the case could not

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98 *New Jersey*, 345 U.S. at 373.

99 *South Carolina*, 130 S. Ct. at 863.

100 *Id.* at 864.

101 *Id.* at 866.

102 *Id.* at 868 n.8 (quoting *Arizona v. California*, 460 U.S. 605, 616 (1983)).

103 *Id.* at 869 (Roberts, C.J., dissenting).

104 *Id.*

105 *See, e.g., Arizona v. California*, 460 U.S. 605 (1983).

106 *See generally* Carstens, *supra* note 18 (acknowledging the vital role played by Special Masters and arguing for reform measures given their important place in original jurisdiction cases).

107 RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 258 (6th ed. 2009).

108 *See* *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806).



proceed without them, the suit would be dismissed.<sup>109</sup> And so while 28 U.S.C. § 1251 did not forbid intervention, it could be that Supreme Court precedent did. However, the *California v. Southern Pacific Co.*<sup>110</sup> decision<sup>111</sup> need not hamstring the Court from deciding such cases (and, indeed, it did not). The complete diversity rule is applicable to § 1332 cases, not to original jurisdiction actions under Article III and § 1251.<sup>112</sup> If an intervenor is not prosecuting a suit against a state, and if that intervenor meets the criteria for intervention laid out by the Court, the citizenship should be of little concern. Though a complicated question, many have argued that the primary reason for diversity jurisdiction is avoiding the prejudices of alien jurisdictions.<sup>113</sup> But if diversity jurisdiction is about avoiding “home-field advantage” in meaningful suits amongst citizens, that concern is a nullity in this case.<sup>114</sup> Here, the suit is already in federal court and it is the *state* suing; traditional diversity concerns are not present.

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109 See FALLON ET AL., *supra* note 107, at 258 (“[I]n *California v. Southern Pac. Co.*, 157 U.S. 229 (1895), after California sued a citizen of another state, the Court determined that the rights of other parties, citizens of California, were so bound up in the action that the litigation should not proceed in their absence. In turn, the Court denied jurisdiction: although there would have been original jurisdiction in an action by California against the non-citizen defendant alone, the inclusion as defendants of California citizens, who could not have been sued independently in the Supreme Court, was fatal to the jurisdiction.”).

110 157 U.S. 229 (1895).

111 See *id.* at 261 (reflecting a former sentiment that the Supreme Court’s original jurisdiction “is limited and manifestly intended to be sparingly exercised”).

112 See 28 U.S.C. § 1332(a) (2006) (“The *district* courts shall have original jurisdiction . . .” (emphasis added)).

113 See, e.g., Diane P. Wood, *The Changing Face of Diversity Jurisdiction*, 82 TEMP. L. REV. 593, 594 (2009) (“Madison mentioned the latter purpose, which is still accepted today, when he speculated that there might be prejudice in some states against the citizens of others who had claims against the in-state parties.”).

114 See Edward A. Purcell, Jr., *The Class Action Fairness Act in Perspective: The Old and the New in Federal Jurisdictional Reform*, 156 U. PA. L. REV. 1823, 1833 (2008) (“The historical record gave sparse indication why the framers and ratifiers adopted [diversity] jurisdiction, and the scattered bits of evidence suggested only that they intended it to provide protection against some kind of bias or unfairness, real or anticipated, that non-residents might encounter in the states.”). But see Stephen B. Burbank, *The Bitter with the Sweet: Tradition, History, and Limitations on Federal Judicial Power—A Case Study*, 75 NOTRE DAME L. REV. 1291, 1323 (2000) (“An important reason for the existence of Article III federal judicial power in diversity (including alienage diversity) cases and for the First Congress’s decision to create lower federal courts had to do with concerns that state courts were hostile to creditors.”). Ultimately, the original reasoning in providing diversity jurisdiction is inconsequential to the point here that it is unnecessary to divest the Court of original jurisdiction because of a native-citizen’s involvement.

*South Carolina* illustrates that intervention as a defendant by a nonstate party is not an issue. The vital take-away from the case is its formulation of the nonstate intervention standard: “[A] proposed intervenor [must] show a compelling interest ‘in his own right,’ distinct from the collective interest of ‘all other citizens and creatures of the state,’ whose interest the State presumptively represents in matters of sovereign policy.”<sup>115</sup> It is this formulation which will be compared to the *Alabama* standard set forth in the next section.

*B. Antithesis—Alabama v. North Carolina, Allowing Nonstate Intervention as Plaintiffs*

Before delving into the *Alabama* decision, it is helpful to distinguish between the two logical pieces of the puzzle that the Court must deal with in deciding whether to grant a nonstate entity’s motion to intervene.<sup>116</sup> First, the Court must ensure that the basic standards for intervention are met. To put it differently, are the intervention requirements of Article III, § 1251, and the Supreme Court’s precedent all satisfied? Second, it should fall to the Court—and indeed Part III will argue that it did fall to the Court—to justify jurisdiction beyond just the basic standards for intervention. In other words, do constitutional provisions external to Article III, such as the Eleventh Amendment, prevent an otherwise proper intervenor from doing so? This portion of the Note only deals with the first question and analyzes the standard for intervention laid down in *Alabama* to acknowledge the internal difficulties of the current model.<sup>117</sup>

In 1986, Congress gave consent under the Compact Clause for the Southeast Interstate Low-Level Radioactive Waste Management Compact (Compact) to be formed: Alabama, Florida, Georgia, Mississippi, North Carolina, South Carolina, Tennessee, and Virginia were

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115 *South Carolina v. North Carolina*, 130 S. Ct. 854, 867 (2010) (quoting *New York v. New Jersey*, 345 U.S. 369, 373 (1953)).

116 See Edward H. Levi & James Wm. Moore, *Federal Intervention: II. The Procedure, Status, and Federal Jurisdictional Requirements*, 47 *YALE L.J.* 898, 902 (1938) (“The nature of his right to intervene is of course only one problem facing the intervenor. The additional problems concerning the intervenor in the federal courts may be classified roughly as dealing with (1) the procedure for intervention; (2) the status of the intervenor; and (3) the federal jurisdictional requirements in their relation to intervention. These problems are only partially solved by the proposed rules of civil procedure, which are somewhat specific as to the procedure for intervention, but which do not cover, save possibly by implication, the status of the intervenor or the problem of jurisdictional requirements.”).

117 The second question is addressed in Part III, *infra*, with a look at the Eleventh Amendment restraint on intervention.

its members.<sup>118</sup> North Carolina was selected as a host state but contributed to the break up of the Compact when it was unable to follow through with its responsibilities.<sup>119</sup> The Compact, not a sovereign entity,<sup>120</sup> attempted to bring an original action against North Carolina in 2000 but was denied because of the language of § 1251.<sup>121</sup> In 2002, Alabama, Florida, Tennessee, and Virginia were joined by the Compact Commission in a suit against North Carolina.<sup>122</sup>

In deciding to allow the Compact's motion to intervene, the Court relied heavily on *Arizona v. California*<sup>123</sup> and used language from that decision in forming its standard for the intervention.<sup>124</sup> The Special Master's position, accepted by the Court, was that "sovereign immunity does not bar the Commission's suit, so long as the Commission asserts the *same claims* and seeks the same relief as the other plaintiffs."<sup>125</sup> And so while the Commission could not bring its claims in a stand-alone action under the Supreme Court's original jurisdiction, the Court held that the Compact could "assert them . . . alongside the plaintiff States,"<sup>126</sup> so long as the "nonsovereign plaintiff[ ] bring[s] an entirely overlapping claim for relief that burdens the State with no additional defense or liability."<sup>127</sup>

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118 See *Alabama v. North Carolina*, 130 S. Ct. 2295, 2302–03 (2010).

119 See *id.* at 2303–05.

120 See *id.* at 2314 n.5 ("We have held that an entity created through a valid exercise of the Interstate Compact Clause is not entitled to immunity from suit under the Eleventh Amendment, see *Hess v. Port Authority Trans-Hudson Corporation*, 513 U.S. 30 (1994), but we have not decided whether such an entity's suit *against* a State is barred by sovereign immunity." (citations omitted)); *id.* at 2317 (Roberts, C.J., concurring in part and dissenting in part) ("The Commission is not a sovereign State.").

121 See *Se. Interstate Low-Level Radioactive Waste Mgmt. Comm'n v. North Carolina*, 531 U.S. 942 (2000) (mem.). There, the Solicitor General successfully urged "denial of the Commission's motion on the grounds that [it] did not fall within [the Supreme Court's] exclusive original jurisdiction over 'controversies between two or more States.'" *Alabama*, 130 S. Ct. at 2305 (majority opinion) (quoting 28 U.S.C. § 1251(a)).

122 See *Alabama*, 130 S. Ct. at 2305.

123 See *id.* at 2314 ("The Special Master relied upon our decision in *Arizona v. California*, which held that the Eleventh Amendment did not bar the participation of several Indian Tribes in an original action . . . ." (citation omitted)).

124 See *id.* ("We granted the Tribes' motion, stating that the States do not enjoy sovereign immunity against the United States, and '[t]he Tribes do not seek to bring new claims or issues against the States' . . . . Thus 'our judicial power over the controversy is not enlarged by granting leave to intervene . . . .'" (alteration in original) (quoting *Arizona v. California*, 460 U.S. 605, 614 (1983))).

125 *Id.* (emphasis added).

126 *Id.* at 2316.

127 *Id.* at 2315.

Given the Commission's ability, according to the congressionally approved Compact, to intervene on behalf of the states,<sup>128</sup> it seems, from a purely interventional standpoint, that the Court's decision was acceptable. Even setting aside Eleventh Amendment issues, though, there may be a problem with the standard set forth in *Alabama* for allowing intervention of a nonstate party. If the claim must be identical to that of the state(s) in the suit, so as not to enlarge the controversy,<sup>129</sup> how does that mesh with *South Carolina's* requirement that intervenors have a compelling interest in their own right that is not adequately represented by the state?<sup>130</sup> The requirement in *Alabama* of not burdening the state with an additional defense<sup>131</sup> may be difficult to reconcile with establishing a unique "angle" in the case that a nonstate party needs to intervene after *South Carolina*. It is to that task that we will turn next.

C. *Synthesis—Attempting to Reconcile South Carolina with Alabama*

In cases where nonstate intervenors bring claims against a state, the Court has normally viewed those claims as supplemental to the suit between the states.<sup>132</sup> Once the initial jurisdiction is established, the Court has decided to answer claims brought within the totality of that controversy between states rather than viewing the Article III/ § 1251 language as constricting.<sup>133</sup> After all, if a court has a legitimate

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128 The Court in *Alabama* gives much credence to the fact that the Commission was authorized to appear on behalf of states within the Compact as an intervenor or a party in interest. See *id.* at 2315–16. However, as noted previously, this was not enough to get the Compact *original* jurisdiction on its own against North Carolina. See *supra* notes 120–21 and accompanying text.

129 See *Alabama*, 130 S. Ct. at 2314.

130 See *South Carolina v. North Carolina*, 130 S. Ct. 854, 867 (2010).

131 See *Alabama*, 130 S. Ct. at 2315.

132 See *supra* notes 62–65 and accompanying text.

133 Although the Supreme Court is not implicated in 28 U.S.C. § 1367, it seems to treat supplemental jurisdiction in its cases in a fashion similar to how the district courts handle supplemental jurisdiction according to the statute. Subsection (a) of § 1367 reads: "Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have *supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III* of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties." 28 U.S.C. § 1367 (2006) (emphasis added). The Supreme Court has adopted this transactional model in managing its original docket.

A further indication of the Supreme Court's willingness to follow the conventions of supplemental jurisdiction is its traditional adherence to the prohibition of § 1367(b) that forbids exercising supplemental jurisdiction when it is inconsistent

complaint before it, the reasons diminish for why the court should not resolve all of the related claims. In these instances, the question for the Supreme Court becomes, "What are the limits to this supplemental original jurisdiction?" At present, the answer seems to be if a non-state entity will not be adequately represented by the state, and its claim is unique in some way, it may bring it in an original action but only if it will not enlarge the controversy and burden the state with an additional defense or liability. In other words, an entity must establish the same claim but in a way that is not already represented.

Though this seems like a Catch-22 scenario, *Trbovich v. United Mine Workers of America*<sup>134</sup> might help to clarify the standard here. Although it arises in a different context, *Trbovich* may be illuminating by showing that these two standards do not have to be mutually exclusive. The Court there held that although a union worker would receive adequate representation in federal court by a government attorney, the worker could still intervene.<sup>135</sup> After all, the Court reasoned, the same claim can be served by different interests, and such interests "may not always dictate precisely the same approach to the conduct of the litigation."<sup>136</sup> An example of this might be a politically charged atmosphere (such as a union dispute) where the government officials are unwilling, for political reasons, to make a certain argument that another party might be willing to make in support of the exact same claim. This line of reasoning *helps* to reconcile the "different claims but no enlargement of the controversy" standard, but the additional language from *Alabama* still remains troublesome.

The *Alabama* Court seems to go too far when it says an intervenor should not burden the State with *any* "additional defense or liability."<sup>137</sup> The liability portion is not difficult to justify since the state's responsibility does not change with the addition of the nonstate party. The any additional defense part, though, seems more difficult.<sup>138</sup> If the *Trbovich* line of reasoning is accepted, the additional interest that necessitates a different litigation strategy will require a different argu-

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with the requirements of § 1332 jurisdiction. See *supra* notes 107–09 and accompanying text.

134 404 U.S. 528 (1972).

135 See *id.* at 539.

136 *Id.*

137 *Alabama v. North Carolina*, 130 S. Ct. 2295, 2315 (2010). The majority relies on the existence of "*entirely* overlapping claims for relief between sovereign and non-sovereign plaintiffs." *Id.* at 2315 n.7 (emphasis added).

138 I am taking this usage of "defense" to be colloquial rather than formal. It seems to refer merely to the act of arguing against a point the other side is raising rather than a rigid formulation raised by the defendant.

ment for the claim. By its nature, this additional argument will trigger an additional defense and the *Alabama* standard will be violated. However, if “no additional defense” means that the state is only made to argue the same basic point, even though it may have to make that same defense against an additional argument, perhaps *Trbovich* resolves the apparent conflict. Far from ideal, the Court is left with either an improperly expanded or an unnecessarily vague standard for intervention that should be clarified or overruled.

### III. DENYING INTERVENTION AND PRESERVING CONSTITUTIONALITY— THE ELEVENTH AMENDMENT BARRIER TO NONSTATE INVOLVEMENT IN SUPREME COURT ORIGINAL JURISDICTION CASES

Waiver and sovereign immunity are two of the common reasons for an otherwise qualified plaintiff to be thrown out of court—external restraints often block legitimate complaints. As noted in Part II.B, the Supreme Court, in considering motions to intervene under its original jurisdiction, must justify jurisdiction beyond the mere qualifications for intervention. It must also consider if there is a restraint external to Article III that prevents an otherwise proper intervenor from doing so. As Chief Justice Roberts argues in dissent in *Alabama*, the Eleventh Amendment is such a restraint for nonstate parties seeking to intervene as plaintiffs in original actions.<sup>139</sup> This Part of the Note examines the arguments, both for and against permitting non-state plaintiff intervenors, and ultimately concludes that the Chief Justice was correct in his assessment.

#### A. *Alabama v. the Eleventh Amendment—Unpacking the Dissent*

The dissent begins with a structural argument that is woven throughout: States are sovereign entities and cannot be sued by non-sovereign entities, even if the claims and relief asked for are the same.<sup>140</sup> It then compares the majority’s proposition from *Arizona* concerning a lack of enlargement of the controversy to the text of the Eleventh Amendment.<sup>141</sup> Finally, the Chief Justice references the history of the Constitution leaving the states’ pre-existing immunity from

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139 See *Alabama*, 130 S. Ct. at 2319 (Roberts, C.J., concurring in part and dissenting in part) (“It is precisely the Commission’s status as a *party*, its attempt to ‘prosecut[e]’ a ‘suit in law or equity . . . against one of the United States, that sovereign immunity forbids.” (alteration in original) (citation omitted) (quoting U.S. CONST. amend. XI)).

140 See *id.* at 2317.

141 See *id.* at 2317–18.

private suits intact<sup>142</sup> before concluding that it is “impossible for the Court to hear private claims against a nonconsenting State without expanding ‘our judicial power over the controversy.’”<sup>143</sup> This section traces the logic behind the arguments in the dissent progressing from the history and text of the Amendment to the structural argument.

When the Constitution was drafted, the prevailing, though still controversial, idea was that states were immune from suit in any area in which immunity was not waived.<sup>144</sup> “Keeping the Founders’ assumptions in mind, they would not have understood the Constitution to provide *any* basis for individuals to sue states in federal court after the adoption of the Eleventh Amendment.”<sup>145</sup> The Amendment has, thus, been interpreted by the Court as follows: “The defect of *Chisholm* was its failure to recognize absolute state sovereign immunity from citizen suits in all circumstances, and this defect was corrected by enshrining such immunity in the Constitution. No individual can sue [a] state in federal court unless the defendant’s constitutional immunity is . . . waived or abrogated.”<sup>146</sup> Though there has been considera-

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142 See *id.* at 2318. This argument is bolstered by the development of the Supreme Court’s sovereign immunity jurisprudence seen in *Alden v. Maine*, 527 U.S. 706, 718 (1999). Though the Eleventh Amendment could be thought to apply only to § 1332 jurisdiction, the Court confirmed that § 1331 was also subject to state immunity requirements even in state court. See Jay Tidmarsh, *A Dialogic Defense of Alden*, 75 NOTRE DAME L. REV. 1161, 1172 (2000) (“*Seminole Tribe* was a horrible blow to nationalists who view the essential function of lower federal courts to be the protection of federal rights. *Alden* rubbed salt in the wound, for it removed even the backstop of state courts (whose decision on federal law could have ultimately been reviewed by the Supreme Court).”).

143 *Alabama*, 130 S. Ct. at 2319 (Roberts, C.J., concurring in part and dissenting in part) (quoting *Arizona v. California*, 460 U.S. 605, 614 (1983)).

144 See THE FEDERALIST NO. 81, at 487 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (“It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*. This is the general sense, and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union. Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the States, and the danger intimated must be merely ideal.”); see also *supra* note 20 and accompanying text (recognizing the traditional justification offered in *Hans*).

145 Clark, *supra* note 12, at 1912 (emphasis added).

146 Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1473 (1987). Though Professor Amar disagrees with the interpretation, he acknowledges its presently understood meaning. See also H. Jefferson Powell & Benjamin J. Priester, *Convenient Shorthand: The Supreme Court and the Language of State Sovereignty*, 71 U. COLO. L. REV. 645, 649 (2000) (“Contrary to the reasoning of the majority in *Chisholm*, the Supreme Court has long viewed the states as possessing *immunity from compulsory jurisdiction* as part of their sovereign status.”).

ble debate on the topic,<sup>147</sup> this view has been the prevailing doctrine since the decisions in *Seminole Tribe* and *Alden*.<sup>148</sup>

In addition to understanding the historical interpretation of the Amendment, it is also helpful to examine the text itself. The Eleventh Amendment says: "The Judicial power of the United States shall not be construed to extend to *any* suit in law or equity, commenced *or* prosecuted against one of the United States by Citizens of another State . . . ."<sup>149</sup> The original jurisdiction suits in question would obviously seem to fall under the heading of "any suit." And though the foundation of these suits is commencement by a state,<sup>150</sup> the *prosecution* of the suit is carried about by all parties involved in the controversy.<sup>151</sup> As the Chief Justice argues, "[t]here is no carve-out for suits 'prosecuted' by private parties so long as those parties 'do not seek to bring new claims or issues.'"<sup>152</sup> Once the Compact was allowed to intervene, it is difficult to see how it was not then prosecuting a suit against one of the United States in violation of the Constitution.

Since the Supreme Court has recognized that "sovereign immunity provides an 'immunity from suit,' not a 'defense to . . . liability,'" it becomes inconsequential that the additional nonstate plaintiff in *Alabama* was seeking the same relief and not imposing any additional defense or liability burden on the state.<sup>153</sup> The relief sought by a plaintiff against a state rarely affects the authority of the Court to hear

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147 See *supra* note 12.

148 See *supra* note 142.

149 U.S. CONST. amend. XI (emphasis added).

150 Normally this is the case. *Alabama* is actually an exception where the Commission commenced the suit along with the states. See *Alabama v. North Carolina*, 130 S. Ct. 2295, 2305 (2010).

151 Commencement and prosecution are two distinct phases of litigation, both of which are prohibited by the Eleventh Amendment. See John V. Orth, *History and the Eleventh Amendment*, 75 NOTRE DAME L. REV. 1147, 1148 (2000) ("There is at least one reason, based in the Amendment's text itself, to wonder whether the drafter understood the phrase in the sense claimed: the suits in question are carefully described as those 'commenced or prosecuted' against a state. Either these words are redundant or they draw a distinction between suits in two different stages of litigation. Jurisdiction is disclaimed as to suits yet to be commenced, that is, begun; but jurisdiction is also disclaimed as to suits previously commenced but not yet prosecuted to final resolution. As to the latter, the judicial power had already attached: they too were to be stopped by stripping the court of jurisdiction. Chief Justice John Marshall certainly understood the distinction this way . . . .").

152 *Alabama*, 130 S. Ct. at 2318 (Roberts, C.J., concurring in part and dissenting in part) (quoting *Arizona v. California*, 460 U.S. 605, 614 (1983)).

153 *Id.* (alteration in original) (quoting *Fed. Mar. Comm'n v. South Carolina Ports Auth.*, 535 U.S. 743, 766 (2002)).



a case.<sup>154</sup> Additionally, the plaintiff being prevented from receiving any relief would not matter either.<sup>155</sup> While the majority relies on sovereign immunity being protected by the proposition that no new claims equals no judicial enlargement,<sup>156</sup> that ultimately begs the question. First, assuming there are no new claims or *issues* (even though new *issues* are created by unique arguments),<sup>157</sup> there is no reason for the nonstate intervention—the interests are already adequately represented. Second, an intervenor in a controversy, by definition, enlarges the judicial power of the Court because it now has another party before it. Third, even if the judicial power is not viewed as being enlarged, sovereign immunity is still violated because the immunity is from suit, not from liability, and a nonstate party is being allowed to prosecute the case against the state.<sup>158</sup> While “[t]he similarity of claims may be relevant to joinder or intervention, . . . those are procedural means of processing claims, not fonts of judicial authority.”<sup>159</sup>

*B. Scalia v. the Eleventh Amendment—Dissecting the Majority Opinion*

In a footnote in *Alabama*, Justice Scalia notes that, because North Carolina did not ask the Court to overturn *Arizona* and because the Court did not want to do so on its own motion without argument, they would “not address the merits” of the dissent.<sup>160</sup> In reality, though, there are attempts by the majority to address the dissent’s Eleventh Amendment argument that should not be overlooked. First, the opinion points out that the Compact may not take the exact same form as a citizen and so could fall outside the prohibitions of the Eleventh

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154 See, e.g., *Seminole Tribe v. Florida*, 517 U.S. 44, 58 (1996) (“[T]he relief sought by a plaintiff suing a State is irrelevant to the question whether the suit is barred . . .”). Section 1983 actions where money will be paid from the state treasury are one of the exceptions to the rule.

155 See *Alabama*, 130 S. Ct. at 2318 (Roberts, C.J., concurring in part and dissenting in part) (“Indeed, we have suggested that private parties may not sue even if a court is ‘precluded . . . from awarding them *any* relief.’” (alteration in original) (quoting *Fed. Mar. Comm’n*, 535 U.S. at 766)).

156 See *id.* at 2314 (majority opinion) (“Thus, ‘our judicial power over the controversy is not enlarged by granting leave to intervene, and the States’ sovereign immunity protected by the Eleventh Amendment is not compromised.’” (quoting *Arizona*, 460 U.S. at 614)).

157 See *supra* Part II.C.

158 See *Alabama*, 130 S. Ct. at 2319 (Roberts, C.J., concurring in part and dissenting in part).

159 *Id.*

160 *Id.* at 2315 n.6 (majority opinion).

Amendment.<sup>161</sup> Second, the majority argues that the Amendment is not compromised if the suit is not enlarged beyond what the state parties are claiming.<sup>162</sup> Third, even in its “refusal” to answer the Chief Justice, it answers him by referencing both precedent and the prudential concern of deciding an un-argued motion.<sup>163</sup> Moreover, additional arguments also require a response.

First of all, if the Compact cannot fairly be called a “citizen of the United States,” (and obviously not a “citizen of a foreign state”) it could possibly be thought of as a quasi-sovereign entity exempt from Eleventh Amendment proscription. Though the Court has not technically decided this question, this argument seems to be the weakest one, and there are multiple indicators that would seem to point against the Commission’s being allowed to bring suit against a state. To begin with, the Compact Commission is not considered by the Court to be sovereign.<sup>164</sup> Since the immunity of states from suit actually extends beyond the text of the Eleventh Amendment by relying on the sovereign/nonsovereign distinction,<sup>165</sup> this is a key determination. If the Commission, though federal, does not have sovereign rights, it begins to look something like a corporation.<sup>166</sup> A corporation would be considered a citizen and obviously barred from suing under the Amendment.

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161 See *id.* at 2314 n.5 (“We have held that an entity created through a valid exercise of the Interstate Compact Clause is not entitled to immunity from suit under the Eleventh Amendment, but we have not decided whether such an entity’s suit *against* a State is barred by sovereign immunity.” (citation omitted)).

162 See *id.* at 2314.

163 See *id.* at 2315 n.6.

164 See *id.* at 2314 n.5. If the Commission were a sovereign entity, it should be entitled to immunity from suit.

165 See *supra* note 142.

166 Commissions are separate legal entities but their exact status is unclear. See Low-Level Radioactive Waste Policy Amendments Act of 1985, Pub. L. No. 99-240, 99 Stat. 1842, 1877 (1986) (“The Commission herein established is a legal entity separate and distinct from the party states capable of acting in its own behalf and is liable for its actions.”). They seem to be a hybrid between federal agencies and corporations. Compare Se. Interstate Low-Level Radioactive Waste Mgmt. Comm’n, By-LAWS (2006), at Art. IX, available at <http://secompact.org/publications> (“The seal of the Southeast Interstate Low-Level Radioactive Waste Management Commission shall contain the name of the Commission, which shall be used in such manner as seals generally are used by public and private corporations.”); with CAROLINE N. BROUN ET AL., THE EVOLVING USE AND THE CHANGING ROLE OF INTERSTATE COMPACTS 53–54 (2006) (“The status of compacts has been a source of conflicting thought over the years. . . . [I]t is now widely accepted that congressionally approved compacts are ‘federalized’ [law] . . .”).

A separate indicator of this argument's failure is the outcome of the Commission's previous motion for leave to file an original complaint with the Supreme Court on its own.<sup>167</sup> Though the Court did not give a definitive reason for the motion's denial, its highlighting of the Solicitor General's argument<sup>168</sup> furthers the belief that the Court views the Commission as a nonsovereign entity lacking the consideration due a state. That fact, combined with the parallel defense of intervention taken from *Arizona*, and the Eleventh Amendment denial in *Seminole Tribe of Florida v. Florida*<sup>169</sup> for the Tribe to bring suit,<sup>170</sup> make it likely that the Commission would be barred from bringing its own suit. If the Seminole Tribe was not allowed to bring suit to enforce a compact, a similarly-situated compact commission should also be barred from doing so<sup>171</sup>—especially given the fact that an Indian tribe at least retains some measure of sovereignty.<sup>172</sup>

The second argument that can be made on behalf of the Eleventh Amendment's not being violated is the similarity between the suit before the Court and the suit that would have existed without the Commission: the judicial power is not enlarged. This knotty issue is actually the one on which the Court hangs its hat in the opinion. As the argument goes, the parties are in court anyway and because there is no extra burden, "the Eleventh Amendment is not compro-

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167 See *supra* note 121 and accompanying text. Allowing otherwise would have violated the law creating the compact. See 99 Stat. at 1873 ("The rights granted to the party states by this compact are additional to the rights enjoyed by sovereign states, and *nothing in this compact shall be construed to infringe upon, limit, or abridge those rights.*" (emphasis added)).

168 See *Alabama*, 130 S. Ct. at 2305.

169 517 U.S. 44 (1996).

170 See *id.* at 76 (holding that "[t]he Eleventh Amendment prohibit[ed] Congress from making the State of Florida capable of being sued in federal court," even though there was a statutory compact scheme in place providing for the state to be sued).

171 The majority could make use of Justice Souter's dissent in *Seminole Tribe* in order to premise the intervention of the Commission on its federal question basis. However, their denial of the Commission's right to bring suit on its own indicates an understandable rejection of that "diversity theorist" line of argumentation.

172 See *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 755–56 (1998) ("We have often noted, however, that the immunity possessed by Indian tribes is not coextensive with that of the States. In *Blatchford*, we distinguished state sovereign immunity from tribal sovereign immunity, as tribes were not at the Constitutional Convention. They were thus not parties to the 'mutuality of . . . concession' that 'makes the States' surrender of immunity from suit by sister States plausible.' So tribal immunity is a matter of federal law and is not subject to diminution by the States." (alteration in original) (citations omitted) (quoting *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 782 (1991))).

mised.’”<sup>173</sup> Additionally, if the judicial power is not actually enlarged, the intervening party is not really prosecuting the case against the state.<sup>174</sup> Or, alternatively, since intervenors can be afforded fewer rights than parties in interest, again, it is not actually the nonstate party prosecuting the case. Since this argument is more complex, it will require more careful rebuttal.

The Chief Justice first works to dispel the notion that the controversy is not enlarged by adding intervenors. As argued previously,<sup>175</sup> if the claims are exactly the same, Supreme Court precedent counsels against granting intervention because the claim is already adequately represented<sup>176</sup> (or could even be enhanced through filing an amicus brief).<sup>177</sup> If the claims, or even the manner in which they are presented,<sup>178</sup> are different at all, the controversy is, by definition, enlarged and the game is up.<sup>179</sup> The Chief Justice’s final attack is proving enlargement of the controversy through highlighting what the Commission gets by becoming a party.<sup>180</sup> Once the Commission garners “stuff” as a party, it is difficult to maintain the majority’s primary argument. Perhaps the best way to save this argument might be to argue that North Carolina had waived its immunity with regard to the Commission by agreeing to the Compact’s terms.<sup>181</sup> However,

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173 *Alabama*, 130 S. Ct. at 2314 (quoting *Arizona v. California*, 460 U.S. 605, 614 (1983)).

174 Lurking in the background here is a notion of supplemental jurisdiction that allows the Court to dispose of the entire controversy at once.

175 See *supra* Parts II.C & III.A.

176 See *New Jersey v. New York*, 345 U.S. 369, 373 (1953).

177 See *Alabama*, 130 S. Ct. at 2319 (Roberts, C.J., concurring in part and dissenting in part) (“If the Commission truly sought nothing for itself—other than ‘a full exposition of the issues’—it could have participated as an *amicus*.” (citation omitted) (quoting the Preliminary Report of the Special Master at 14, *Alabama v. North Carolina*, 130 S. Ct. 2295 (2010) (No. 132), 2009 WL 4709541, at \*14)).

178 See *supra* Part II.C (discussing *Trbovich*).

179 See *Alabama*, 130 S. Ct. at 2319 (Roberts, C.J., concurring in part and dissenting in part) (“It is . . . impossible for the Court to hear private claims against a nonconsenting State without expanding ‘[its] judicial power over the controversy.’” (quoting *Arizona v. California*, 460 U.S. 605, 614 (1983))).

180 See *id.* (“As a party, the Commission enjoys legally enforceable rights against the defendant State: It may object to settlement, seek taxation of costs, advance arguments we are obliged to consider, and plead the judgment as *res judicata* in future litigation.”).

181 See GRESSMAN ET AL., *supra* note 5, at 625 (“Although 28 U.S.C. §1251(b)(3) speaks only in terms of actions ‘by a State,’ it is arguable that the Supreme Court also enjoys original jurisdiction of suits *against* a state by citizens of different states or aliens where a state has waived its Eleventh Amendment immunity. The failure of the statute to address this possibility is not dispositive since the Constitution vests the Court with original jurisdiction over all cases ‘in which a State shall be Party,’ and the

waiver was not applicable in the case,<sup>182</sup> and the opinion established a broader precedent for nonstate plaintiff intervention against which the Chief Justice is arguing.

The final argument utilized to rebut the dissent is a reliance on precedent and a prudential reticence to overturn it without argument on the matter.<sup>183</sup> Though the Court has not been bashful on previous occasions about overturning precedent and deciding jurisdictional issues raised *sua sponte*,<sup>184</sup> perhaps it should be given the benefit of the doubt for recognizing here that such moves may not always be prudent. However, given the serious nature of the questions raised,

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Court has stated repeatedly that Congress cannot diminish that jurisdiction." (quoting U.S. CONST. art. III, § 2, cl. 2)).

182 See The State of North Carolina's Sur-Reply Brief at 22, *Alabama*, 130 S. Ct. 2295 (No. 132), 2009 WL 5945958, at \*22 ("While *Entergy [Arkansas, Inc. v. Nebraska]*, 241 F.3d 979 (8th Cir. 2001)) thus establishes that a State *can* waive its immunity by joining a Compact that expressly authorizes its Commission to enforce its provisions by suing member States in federal court, it also demonstrates indirectly why North Carolina did *not* waive its immunity by entering into the Southeast Compact, which includes no such enforcement provision.").

The Special Master for *Alabama* "assumed for the sake of argument that a State possesses sovereign immunity against a claim brought by an entity, like the Commission, created by an interstate compact" before still recommending that the intervention be allowed. *Alabama*, 130 S. Ct. at 2314. This position of the Special Master was confirmed by the majority's holding that "[w]hile the Commission may not bring [claims] in a stand-alone action under this Court's original jurisdiction, see §1251(a), it may assert them in this Court alongside the plaintiff States." *Id.* at 2316. The intervention is allowed *in spite of* supposed immunity.

183 See *Alabama*, 130 S. Ct. at 2315 n.6. However, the Eleventh Amendment argument *was* raised on brief. See The State of North Carolina's Sur-Reply Brief, *supra* note 182, at \*1-19; Brief in Reply to North Carolina's Exceptions to the Preliminary and Second Reports of the Special Master at 2-23, *Alabama*, 130 S. Ct. 2295 (No. 132), 2009 WL 4874106, at \*2-23.

184 See, e.g., *Louisville & Nashville R.R. v. Mottley*, 211 U.S. 149, 152 (1908) ("We do not deem it necessary, however, to consider either of these questions, because, in our opinion, the court below was without jurisdiction of the cause. Neither party has questioned that jurisdiction, but it is the duty of this court to see to it that the jurisdiction of the Circuit Court, which is defined and limited by statute, is not exceeded. *This duty we have frequently performed of our own motion.*" (emphasis added) (citing multiple cases)).

The Court has actually been divided as to whether Eleventh Amendment questions are truly "subject matter jurisdiction" questions that should be decided on the Court's own motion. See FALLON ET AL., *supra* note 107, at 883 ("The Court has taken a range of positions on this issue, indicating, for example, in *Edelman v. Jordan*, 415 U.S. 651 (1974), that the matter is jurisdictional, but stating in *Patsy v. Board of Regents*, 457 U.S. 496, 515-16 n. 19 (1982), that an Eleventh Amendment question is not jurisdictional 'in the sense that it must be raised and decided by this Court on its own motion.' More recently, in *Wisconsin Dep't of Corrections v. Schacht*, 524 U.S. 381, 391 (1998), the Court said that the issue has yet to be resolved.").

perhaps the Court should have either resolved the issue on its own or asked the parties to brief the matter before deciding.<sup>185</sup> And in reality, it is not difficult to follow the Chief Justice's reasoning for why the *Arizona* decision was "built on sand"<sup>186</sup>—the decision could have easily been overturned or distinguished. *Arizona* bases its reasoning on a single footnote in *Maryland* that completely missed the boat on the issue of sovereign immunity and thus would have been easy to overrule.<sup>187</sup> Alternatively, the Court could have held *Arizona* to be correct on tribal sovereignty grounds but inapplicable here.<sup>188</sup> At the least, the Court could have distinguished *Arizona* by pointing out the United States' involvement in the case and arguing that the parallel claims of the Indian Tribes only represented those of the United States.<sup>189</sup> However, the bottom line here is that, if the Court lacked jurisdiction, it was the Court's job to address that and decline the Commission's motion.<sup>190</sup>

### C. *Alabama v. The Constitution*

"If then, the courts are to regard the constitution, and the constitution is superior to any ordinary [decision of the Supreme Court], the constitution, and not such ordinary act, must govern the case to which they both apply."<sup>191</sup> Moving forward, it seems that it is *Alabama*,

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185 See ERWIN CHEMERINSKY, *FEDERAL JURISDICTION* § 2.3.1, at 61 (5th ed. 2007) ("[If an issue] is jurisdictional, federal courts *can* raise it on their own and it may be challenged at any point in the federal court proceedings." (emphasis added)). Considering the "grave nature" of the Supreme Court's original jurisdiction, Eleventh Amendment questions should be considered jurisdictional—at least for that docket.

186 *Alabama*, 130 S. Ct. at 2318 (Roberts, C.J., concurring in part, dissenting in part). "The relevant portion of that opinion is almost wholly unreasoned. It cites only a footnote in a prior case, the pertinent paragraph of which failed even to discuss the State's immunity from private suit. That paragraph addressed only intervention, not sovereign immunity, and the two issues are distinct." *Id.* (citations omitted).

187 See *supra* notes 72–74 and accompanying text.

188 See *infra* note 194.

189 The federal government is allowed to assign its claims for prosecution in federal court. Though *qui tam* actions are normally brought against individuals, the same type of reasoning could be used to distinguish *Arizona*. See FALLON ET AL., *supra* note 107, at 150. It could be argued that the federal nature of the Interstate Compact Commission in *Alabama* creates a situation akin to assignment of a federal claim, but that move would require assuming its validity prior to making the leap from there to justification of nonstate intervention. *Arizona* involved actual claims already under consideration rather than some implied ability to bring claims.

190 See Levi & Moore, *supra* note 116, at 910 ("A lack of real jurisdiction must be taken account of by the court itself, and no matter how the question is raised, a court will have to dismiss proceedings over which it lacks such jurisdiction.").

191 Adapted from *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 178 (1803).

and maybe not *Arizona*, that should be overturned. In a way, footnote six of the opinion (the majority's response to the dissent's argument) is almost begging for the Court to revisit this issue; perhaps next time, the Court will follow the Chief Justice's logic and rule against allowing nonstate plaintiff intervenors. Not because it violates Article III or § 1251, but because of the Eleventh Amendment's prohibition.<sup>192</sup>

#### IV. RECOMMENDATIONS FOR ORIGINAL ACTION INTERVENTION JURISPRUDENCE

Recent decisions by the Supreme Court concerning nonstate intervention in original actions have created jurisprudential inconsistencies and require reform in order to avoid constitutional inadequacies. Nonstate intervention qua intervention is a perfectly acceptable form of case management, and nonstates have been parties to suits in original actions of the Court from the beginning. Though the dissent expressed doubts about the nonstate parties intervening as defendants in *South Carolina*, it was within the constitutional discretion of the Court to allow. The only thing needed at this point is a clear articulation of the circumstances under which such parties will be countenanced.

As an external restraint, however, the Eleventh Amendment should prevent nonstate plaintiff intervenors such as the Commission in *Alabama*—even if relief is completely precluded.<sup>193</sup> The text and history of the Amendment seem to be clear that states were not to be sued by nonsovereign entities.<sup>194</sup> And it appears that intervenors

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192 Cf. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 121 (1984) (“[N]either pendent jurisdiction nor any other basis of jurisdiction may override the Eleventh Amendment.”).

193 It seems unlikely that relief would be denied altogether as there are several options for bringing suit that circumvent the difficulties of the Eleventh Amendment. One is a suit against “a state officer as defendant instead of the state government . . . derived from English common law under which the King had sovereign immunity, but other officials could be sued to remedy wrongs done by the government.” CHEMERINSKY, *supra* note 185, § 7.5.1, at 432; see also Tidmarsh, *supra* note 142, at 1178–79 (“First, as a statement of fundamental American law, the ‘no right without a remedy’ principle has never been absolute. Second, and relatedly, the various remedies that I have already listed—*Ex parte Young* injunctions, federal enforcement, and damages suits against responsible state officials—are significant, even if not equally effective; the *Marbury* ‘no right without a remedy’ principle has never been understood to require that the most effective remedy is constitutionally compelled.”). Another solution might be to sue the United States, as shown in previous original action cases. See *supra* Part I.B.

194 This interpretation of state sovereign immunity (adopted by the Court) makes sense because of federalism concerns. It should be up to the states to decide, to a

clearly have enough party status to fall within the ambit of the Amendment. A serious consideration is that, if nonstate plaintiff intervenors are allowed and the other parties drop their suits or settle, the Court could end up with the exact type of suit that it has acknowledged previously is unconstitutional—a nonsovereign entity suing a state.

This external restraint loomed over the decision in *Alabama* and played a role in the formation of its inconsistent intervention standard.<sup>195</sup> There appear to be two possible solutions to this. The first is that the new language of the standard could be treated as dicta in future cases even though it seems to represent the holding of the Court.<sup>196</sup> The second would be to overturn *Alabama* and return to the discretionary standard from *New Jersey*<sup>197</sup> echoed in *South Carolina*.<sup>198</sup> The Court obviously must walk a fine line here, and the balance

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large extent, when and where they will be sued—not individual citizens. However, though it is beyond the scope of this Note, I would argue that Indian Tribes, especially given their quasi-sovereign nature, should not be barred by the Eleventh Amendment from prosecuting suits against states, *contra Seminole Tribe*. Prior to the *Blatchford* decision, the Ninth Circuit correctly “concluded that the consent of the states to suit in federal court by Indian tribes was ‘inherent in the constitutional plan.’” AMERICAN INDIAN LAW DESKBOOK 229 (Clay Smith et al. eds., 4th ed. 2008) (quoting *Native Vill. of Noatak v. Hoffman*, 896 F.2d 1157, 1162 (9th Cir. 1990), *rev’d sub nom. Blatchford v. Native Vill. of Noatak*, 501 U.S. 775 (1991)). However, the Supreme Court subsequently held that the Tribes were not parties to the “mutuality of . . . concession” that “makes the States’ surrender of immunity from suit by sister States plausible.” *Blatchford*, 501 U.S. at 782.

There are two easily recognizable responses that rebut this contention: First, it seems a little disingenuous to absorb a sovereign entity after making certain arrangements and then penalize them for not being present when the arrangements were made, since they were not planning on joining the group in the first place. Second, by virtue of the United States absorbing sovereign Indian Nations, the claims of the Tribes should either be seen as those of the United States (as it seems may have been the case in *Arizona*), or the states should be presumed to have waived sovereign immunity with respect to the Tribes as they have with respect to the federal government.

195 See *supra* Part II.C (highlighting the difficulty reconciling *South Carolina* with *Alabama* and pointing to a need for consistency moving forward).

196 The focus of the Court on not enlarging the controversy was assumed to be acceptable as long as no extra burden was placed on the state to defend claims brought by the intervenor. This new standard, presumably the holding in order to allow intervention in the case, is what Chief Justice Roberts referred to as “no harm, no foul” jurisdiction.” *Alabama v. North Carolina*, 130 S. Ct. 2295, 2317 (2010) (Roberts, C.J., concurring in part and dissenting in part).

197 See *supra* Part II.A. The intervenor must show “some compelling interest in his own right, apart from his interest in a class with all other citizens and creatures of the state, which interest is not properly represented by the state.” *New Jersey v. New York*, 345 U.S. 369, 373 (1953).

198 See *supra* note 115 and accompanying text. The language almost exactly tracks *New Jersey*.



between maintaining fairness and opening the floodgates in these matters is delicate. In a normal case, if a claim will not adequately be represented by another party, an entity should be allowed to intervene "of right."<sup>199</sup> Yet all nonstate party intervention in original actions between states is discretionary.<sup>200</sup> Indeed, any nonstate party is only ever before the Supreme Court as a matter of judicial grace—original jurisdiction for nonsovereigns, even in suits with States, is not exclusive. *Alabama* took the standard too far and should be overturned anyway for reasons discussed in Part III. The *New Jersey* standard<sup>201</sup> captures the balance between fairness and not offending the grave nature of the Court's original jurisdiction; *Alabama v. North Carolina* simply extended the logic further than necessary in an attempt to account for its Eleventh Amendment shortcomings.

One could charge that allowing nonstate defendant intervenors while preventing plaintiffs creates an inconsistency due to the existence of counterclaims, etc.<sup>202</sup> After all, do the counterclaims not create instances of claim prosecution against the state? However, because the defendant is not the one who instigated the lawsuit, it seems patently unfair to prevent claims that could afterward be precluded. Though a circuit split exists on this issue,<sup>203</sup> if a state instigates a suit where potential defendant intervenors can come in, it is no longer comprehensible that they should be able to hide behind

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199 See Moore & Levi, *supra* note 19, at 591 ("[W]here a petitioner is represented in a proceeding, he will be bound by a decree of the court, whether he can show an interest in property or not. It, therefore, becomes even more important that the right to intervene be absolute if the representation is shown to be inadequate.").

200 See McKusick, *supra* note 13, at 189 ("In managing its original jurisdiction docket, the Supreme Court does not consider itself bound to follow what it has itself called a 'time-honored maxim of the Anglo-American common-law tradition' that a trial court generally must hear and decide any and all lawsuits that fall within its jurisdiction." (quoting *Ohio v. Wyandotte Chems. Corp.*, 401 U.S. 493, 496–97 (1971))).

201 The *New Jersey* standard was endorsed by both the majority and dissent in *South Carolina*. See *South Carolina v. North Carolina*, 130 S. Ct. 854, 867 (2010); *id.* at 870 (Roberts, C.J., dissenting). The disagreement there stemmed from the standard's application, in an apportionment suit, to a nonsovereign entity.

202 See Levi & Moore, *supra* note 116, at 919 ("The right of an intervener to press an affirmative claim against the plaintiff goes to the very heart of the intervener's status.").

203 See FALLON ET AL., *supra* note 107, at 883 ("When a state files suit in federal court, it necessarily waives its sovereign immunity from the court's jurisdiction to determine the validity of its claims and of any defenses that might be asserted against those claims. The circuits are divided on whether a state's voluntary appearance as a plaintiff in federal court waives the state's sovereign immunity with respect to compulsory (or permissive) counterclaims . . ." (citation omitted)).

the shield of sovereign immunity. In these circumstances, it is entirely fair to say that the state has waived any immunity.<sup>204</sup>

#### CONCLUSION

Intervention in original actions of the Supreme Court is primarily discretionary. According to that prerogative, the Court chose to allow nonstate, nonsovereign defendants to intervene in *South Carolina v. North Carolina*. The extension of that privilege to nonstate, nonsovereign plaintiffs in *Alabama v. North Carolina*, however, not only created a potentially inconsistent standard for intervention but also violated the Eleventh Amendment. The Court should revisit *Alabama* in the future and heed the Chief Justice's admonition.

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204 See CHEMERINSKY, *supra* note 185, § 7.6, at 453 ("Although allowing such waivers seems inconsistent with viewing the Eleventh Amendment as a restriction on the federal courts' subject matter jurisdiction, it is firmly established that 'if a State waives its immunity and consents to suit in federal court, the Eleventh Amendment does not bar the action.' Permitting states to waive their Eleventh Amendment immunity reflects the close relationship between the amendment and sovereign immunity." (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238 (1985))).



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